



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Victory Integrated Systems, Inc.

File: B-244782

Date: November 7, 1991

Jeffrey N. PUNCHES for the protester,
Mark Green, Alpha Strike Joint Venture, an interested party.
Eric A. Lile, Esq., and Thomas T. Basil, Department of the
Navy, for the agency.
Anne B. Perry, Esq., and Paul Lieberman, Esq., Office of the
General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

1. Allegation that agency misled protester during discussions by questioning its low wage rates, which resulted in the protester raising the rates to its prejudice, is denied where the awardee's direct wage rates were, in fact, higher than protester's.
2. Allegation that awardee proposed significant amounts of prohibited uncompensated overtime is denied where solicitation does not prohibit offering uncompensated overtime, and if the awardee had structured its workweek to include significant amounts of uncompensated overtime its proposal would have been downgraded for offering low wage rates.
3. Allegation that awardee's proposal is unbalanced because its price decreases significantly for the option years is denied where awardee's price is lower than offeror's for base period and for option years.

DECISION

Victory Integrated Systems, Inc. protests the award of a contract to Alpha Strike Joint Venture under request for proposals (RFP) No. N61339-90-R-0024, issued by the Department of the Navy for supplies and services to support Instructional Systems Development (ISD) for Aviation Strike Warfare Systems. Victory alleges that the award to Alpha is improper because Alpha's price reflects unreasonably low labor rates.

We deny the protest.

The solicitation, a small business set-aside, contemplates an indefinite delivery, indefinite-quantity contract, with provision for both time and materials and firm, fixed-price delivery orders. The award is for a 1-year contract with three 1-year options. The RFP provided that award would be made on the basis of the "best value" to the government, price and other factors considered, with technical considerations slightly more important than price. The technical evaluation criteria, listed in descending order of importance were: Personnel, Program Management, Past Performance and Technical Approach.

Six offerors submitted proposals by the May 25, 1990, date set for receipt of initial proposals, five of which were included in the competitive range. Discussion questions/comments were distributed to these offerors on January 24, 1991, and responses received on February 7. Following evaluation of these revisions, on March 13, the competitive range was further reduced to three offerors, which included Victory and Alpha. A request for best and final offers (BAFOs) was issued on March 13, and BAFOs were received by March 22.

A final proposal analysis report (PAR) was produced to consolidate the updated technical and pricing evaluations, and was received by the source selection authority on May 15. Alpha's proposal was rated as technically acceptable with moderate risk, and it offered the lowest evaluated price. Victory's proposal was rated technically acceptable with low risk, but the price was significantly (approximately \$3.7 million) higher than Alpha's. Award was made to Alpha on June 14, based on the source selection authority's determination that the technical advantage offered by Victory's proposal did not merit a \$3.7 million price premium.

Victory asserts that during discussions on a previous solicitation, as well as on the present one, the agency told Victory that its labor rates were "significantly lower than competitive market rates," and that its proposal would be downgraded unless it proposed more competitive rates.¹ The protester states that these statements led it to increase its proposed rates. Victory alleges that the Navy's award to Alpha represents labor rates averaging 16 percent lower than those originally proposed by Victory, which were criticized by the agency as too low. Therefore, the protester alleges that either: (1) the agency misled Victory as to the acceptability of its labor rates and

¹Here, nevertheless, Victory reduced its total price in its best and final offer.

evaluated Alpha differently; or (2) the Navy improperly permitted Alpha to propose significant amounts of uncompensated overtime. Victory also alleges that Alpha's offer is unbalanced because its price only becomes significantly lower than Victory's price in the option years.

In reviewing protests against the propriety of an agency's evaluation of proposals, we do not independently evaluate those proposals. Johnson & Gordon, Inc., B-241547, Feb. 20, 1991, 91-1 CPD ¶ 191. The contracting agency is primarily responsible for determining the relative desirability and technical acceptability of proposals, and in exercising this responsibility, the contracting agency enjoys a reasonable degree of discretion. Id. Consequently, we will question the agency's technical evaluation only where the record shows that the evaluation does not have a reasonable basis or is inconsistent with the evaluation criteria listed in the RFP. LinCom Corp., B-242459, Apr. 25, 1991, 91-1 CPD ¶ 409. The fact that the protester disagrees with the agency does not itself render the evaluation unreasonable. VGS, Inc., B-233116, Jan. 25, 1989, 89-1 CPD ¶ 83.

With respect to the proposed wage rates, the solicitation provided:

"EVALUATION OF UNREASONABLY LOW RATES

The contractor proposed rates, both direct and indirect, will be considered as an evaluated item in the technical proposal. An offer based upon unreasonably low rates may be technically downgraded due to performance risk."

The agency explains that its concern, in this regard, arises from its experience which indicates that poor compensation results in low quality staff and low retention rates. Here, although Alpha's price is significantly below Victory's, contrary to the protester's assumption, Alpha's price does not reflect lower direct labor rates. In fact, Alpha's direct labor rates are higher than Victory's. The cost savings under Alpha's proposal result from its significantly lower indirect rates (for such items as general and administrative expenses and profit), which the agency does not consider present the same problems as the payment of low wages to personnel. The evaluators determined that Alpha has relatively strong personnel resources and recruitment abilities. In addition, it found that the direct compensation rates offered by Alpha are competitive in the overall labor market and should result in

adequate recruitment and retention rates. Thus, Victory's contention that it was misled during discussions with respect to its labor rates is based on its mistaken premise concerning the level of Alpha's direct labor rates.

To the extent that indirect costs may be below actual expenses that will be incurred by Alpha, the submission of a below-cost offer is legally unobjectionable; whether a contract can be performed at the offered price is a matter of the offeror's responsibility. Virginia Mfg. Co., Inc., B-241404, Feb. 4, 1991, 91-1 CPD ¶ 113. We will not review a contracting officer's affirmative determination of responsibility absent circumstances not alleged here. See 4 C.F.R. § 21.3(m) (5) (1991).

Victory also speculates that Alpha's proposal must incorporate significant amounts of uncompensated overtime² which Victory contends violates both California law (where Victory but not Alpha is located) and federal law. This is a time and materials type contract in which the RFP sets forth specific numbers of hours in each labor category. The agency explains that while some contractors did propose workweeks that exceed 40 hours, the RFP does not preclude this arrangement; rather, the contractor is only required to reimburse nonexempt employees in accordance with applicable laws. Here, the agency was not concerned with the potential abuses associated with uncompensated overtime because the traditional uncompensated overtime issues of indirect cost allocation and a misrepresented workweek are eliminated under a fixed-price contract where employee compensation is evaluated. If a contractor unreasonably manipulates the workweek in order to lower its proposed hourly rates, it runs a major risk of being downgraded. Further, the RFP does not prohibit offeror's from proposing uncompensated overtime, nor are we aware of any law or regulation prohibiting its use. General Research Corp., B-241569, 70 Comp. Gen. ___, Feb. 19, 1991, 91-1 CPD ¶ 183. Further, any question concerning whether the awardee performs the contract in compliance with applicable wage standards is within the jurisdiction of the Department of Labor, and is not for our review. NKE Eng'g, Inc.; Stanley Assocs., B-232143; B-232143.2, Nov. 21, 1988, 88-2 CPD ¶ 497.

Victory's final allegation is that Alpha's proposal is unbalanced because its price only becomes substantially lower than Victory's in the option years. Specifically, Victory alleges that Alpha's price for the first year is


²Uncompensated overtime refers to the overtime hours (hours in excess of 8 hours per day/40 hours per week) incurred by salaried employees who are exempt from coverage of the Fair Labor Standards Act, 29 U.S.C. § 202 (1988).

only about 2 percent lower than the protester's, while in the option years its price is much less. The protester also alleges that had the agency done a cost/technical tradeoff by comparing only the base year prices, then Victory would have received the award.

An offer may be rejected as unbalanced where it is both mathematically unbalanced, that is, based on nominal prices for some items and enhanced prices for other items, and material unbalanced, where an offer is mathematically unbalanced and there is a reasonable doubt that the award will result in the lowest cost to the government. District Moving & Storage, Inc.; Todd Van & Storage, Inc.; Eureka Van & Storage Co., Inc., B-240321; B-240321.2; B-240321.3, Nov. 7, 1990, 90-2 CPD ¶ 373. Here, Alpha's offer cannot be materially unbalanced since it is at all times lower than Victory's. Further, it is not mathematically unbalanced since its option year prices are lower than its initial year because it will no longer have the start-up costs, and because it will move the work from the higher-priced subcontractors to lower-priced team members after these individuals have gained the necessary experience. Thus, the price reductions reflect actual costs, not merely an enhanced base year price.

Victory's allegation that the agency should have conducted a cost/technical tradeoff on a comparison of only the base year is in conflict with the plain language of the solicitation, which provides that "the government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement." To the extent that the protester is challenging this evaluation method as unreasonable, its protest is untimely. 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991).

The protest is denied.


for James F. Hinchman
General Counsel